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No. 03-

IN THE

Supreme Court of the United States

JOE LEWIS and JUDY LEWIS, as Parents and Guardians of BRANDON D. LEWIS, and BRANDON D. LEWIS, an Individual Florida Resident,

Petitioners,

v.

THE UNITED STATES OF AMERICA, THE UNITED STATES COAST GUARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Following a scuba diving accident, the United States Coast Guard participated in a search and rescue of Brandon Drew Lewis. The Coast Guard knew it was responding to an injured diver who was unconscious and suffering from the bends. Despite this knowledge and after making the decision to undertake the rescue of Mr. Lewis, the Coast Guard negligently conducted its efforts and failed to render meaningful assistance to Mr. Lewis. Mr. Lewis suffers from permanent paralysis and cognitive deficits as a result. The Court of Appeals relied on the discretionary function exception to government tort liability in affirming a grant of summary judgment in favor of the United States. The Court of Appeals held that the Coast Guard enjoys unbridled discretion in the methods chosen to effectuate the rescue, even after it decided to undertake the rescue and its negligent conduct resulted in enhanced injuries to Mr. Lewis.

This ruling creates a conflict between decisions of this Honorable Court and several United States Circuit Courts of Appeals, which poses the following questions:

Does the discretionary function exception afford absolute immunity to the Coast Guard during search and rescue operations; or is the Coast Guard obligated to use due care once it makes a decision to institute a search and rescue operation and/or render aid to a mariner in distress?

If the Coast Guard is obligated to use due care, does a distressed mariner who detrimentally relies on the Coast Guard under facts that satisfy the Good Samaritan rule, have any remedy against the government agency?

PARTIES TO PROCEEDING

1. Joe Lewis. Individual Florida resident and parent and natural guardian of Brandon Drew; appellant in the court of appeals in No. 02-16450; plaintiff in the district court.

2. Judy Lewis. Individual Florida resident and parent and natural guardian of Brandon Drew; appellant in the court of appeals in No. 02-16450; plaintiff in the district court.

3. Brandon Drew Lewis. Individual Florida resident; appellant in the court of appeals in No. 02-16450; plaintiff in the district court.

4. United States of America, United States Coast Guard. Appellee in the court of appeals in No. 02-16450; defendant in the district court.

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The petitioners, Joe Lewis, Judy Lewis and Brandon Drew Lewis, pray that the Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals, No. 02-16450, is not formally reported. It is attached as Appendix A. The order denying the petition for rehearing or rehearing en banc is unpublished. It is attached as Appendix C. The ruling of the United States District Court for the Middle District of Florida, Jacksonville division, is likewise unpublished. The district court's ruling is attached as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on November 20, 2003. An order of the Court of Appeals denying a timely petition for rehearing and petition for rehearing en banc was entered on March 12, 2004. (Pet. App. C).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article VI, Clause 2

> This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under

the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 14 United States Code, Section 88
Saving life and property

(a) In order to render aid to distressed persons, vessels, and aircraft on and under the high seas and on and under the waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

> (1) perform any and all acts necessary to rescue and aid persons and protect and save property; * * *

Title 28 United States Code, Section 2680 Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. * * *

**Title 46 United States Code,
Section 742 Libel In Personam**

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or any corporation mentioned in section 741 of this title. * * *

Title 46 United States Code Appendix, Section 781 Libel in admiralty against or impleader of the United States

> A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1920.

STATEMENT

The admiralty jurisdiction of the district court was invoked under 28 U.S.C § 1333.

Following a scuba diving accident approximately twenty-eight miles off the coast of Mayport, Florida, Brandon Drew Lewis was rendered unconscious by a condition known as the bends. Members of the Lewis vessel's party immediately notified the Group Mayport Coast Guard station that Mr. Lewis was an

injured diver suffering from the bends. The Coast Guard search and rescue coordinator understood the life-threatening severity of the situation and knew that providing a "bent" diver with oxygen and fluids was imperative. Armed with this knowledge, the Coast Guard made the decision to undertake the search and rescue of Mr. Lewis.

Once the decision to undertake the rescue was made, the Coast Guard dispatched a 41 foot boat to rendezvous with the Lewis vessel. However, the Coast Guard crew was neither trained nor cognizant as to how to respond to an injured diver such as Mr. Lewis. Mr. Lewis was transported to the Coast Guard vessel at sea from the faster Lewis vessel and eventually carried to shore. En route, the Coast Guard failed to provide any oxygen, fluids or any benefit to Mr. Lewis. In fact, the Coast Guard crew testified they would not have administered oxygen to Mr. Lewis even if they knew he would die without it.

The importance of immediate oxygen administration to an injured diver is well-known and undisputed. Timely receipt of care can eliminate the symptoms of the bends and prevent neurological injury. The transfer of Mr. Lewis to the Coast Guard vessel exhausted valuable time and made no sense.

In fact, the sole reason Mr. Lewis was transferred to the Coast Guard vessel was the well-founded belief by Mr. Lewis' brother that he would receive immediate, appropriate care. This reliance cost Mr. Lewis dearly. According to his treating physician, Mr. Lewis would have recovered from his injuries with little or no permanent impairment if he had been given oxygen by the Coast Guard.

The Coast Guard engendered reliance on its search and rescue expertise to the eventual and permanent detriment of

Mr. Lewis. Instead of exercising its discretion by declining to undertake the Lewis search and rescue, the Coast Guard dispatched an untrained crew that never had any intention of providing fluids, oxygen or any benefit whatsoever for his condition. Despite clear weather, the Coast Guard failed to utilize all available means to ensure an appropriate search and rescue was conducted. This decision was made, in part, because the 41 foot boat provided estimated times of arrival that were inaccurate by nearly one-hundred percent – each way. The Coast Guard should have simply declined the search and rescue and allowed the Lewis vessel to transport Mr. Lewis more quickly to shore.

The petitioners sued the United States for the personal injuries suffered by Brandon Drew Lewis alleging that the Coast Guard failed to exercise reasonable care during the search and rescue to Mr. Lewis' detriment. Coast Guard personnel testified that they knew they were responding to an injured diver with the bends, which they knew was a life-threatening condition. However, Coast Guard personnel intentionally did not take any oxygen and intentionally did not provide Mr. Lewis with any fluids.

Both parties moved for summary judgment. The government moved for summary judgment, claiming the Coast Guard's actions during the search and rescue were discretionary.[1] It argued the discretionary function exception of the Federal Torts Claims Act, as implied into the Suits in Admiralty Act and the Public Vessels Act, preserved the government's sovereign immunity as no federal statute,

1. The government actually filed a second Rule 12 motion to dismiss identical to its initial motion to dismiss, which was previously denied by the district court. The district court converted the second Rule 12 motion to a Rule 56 motion for summary judgment.

regulation or policy manual provided specific mandates for the Coast Guard's conduct at issue. The district court granted summary judgment in favor of the government, finding that the discretionary function exception applied to Coast Guard decisions regarding how to proceed with the search and rescue of Mr. Lewis, which effectively abolished the duty to use due care. Pet. App. 13a-14a.

In affirming the district court's grant of summary judgment, the Court of Appeals failed to address controlling search and rescue precedent holding that the discretionary function exception applies solely to the Coast Guard's decision to undertake a search and rescue. Instead, it established a broad rule of immunity by finding:

> The decision to undertake the rescue extends not only to the decision to rescue, but also to the methods chosen by the Coast Guard to effectuate the rescue.

Pet. App. 3a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals decision overturns nearly fifty years of jurisprudence. Its opinion directly conflicts with the decisions of the United States Supreme Court and the United States Courts of Appeals for the First, Fourth, Fifth, Sixth, and Ninth Circuit.

Has the Eleventh Circuit's interpretation of the discretionary function exception of the Federal Tort Claims Act eviscerated the plain language of the Suits in Admiralty Act and Public Vessels Act?

Petitioners rely on long-standing precedent which affords jurisdiction in instances where the Coast Guard fails to act with reasonable care after it exercises its discretion to undertake a search and rescue. This law applies specifically where the rescue involves a person with known diving-related injuries and in a life-threatening condition under circumstances in which the decision to undertake the rescue engenders reliance on the Coast Guard. Here, the Coast Guard made the decision to undertake the rescue with full-knowledge of the type and severity of Drew Lewis' condition. Despite that knowledge, the Coast Guard dispatched a boat with an untrained and ill-prepared crew. The circumstances known to the Coast Guard at the time it exercised its discretion to undertake the "rescue" required a specific course of conduct. Essentially, the Coast Guard provided a water taxi, which was relied upon by the Lewis vessel to the detriment of Brandon Drew Lewis. The Coast Guard's actions (and omissions) render the United States amenable to suit and liable for its negligence.

The undisputed evidence shows that the Divers Alert Network (DAN) (headquartered at Duke University, Raleigh, North Carolina) offered the entire Coast Guard free instruction on the administration of oxygen to injured divers. No later than three years before Mr. Lewis' accident, the Coast Guard Commandant made a policy decision and issued a directive that all Coast Guard first responders be trained pursuant to the DAN program. Even though the Coast Guard Commandant directed that DAN materials be distributed to all Coast Guard first responders in Group Mayport, this training was only conducted in a few locations in Group Mayport's district. The Commander's directive establishes Coast Guard policy. This policy was ignored at the Coast Guard station at issue and culminated in the Coast Guard exercising its discretion to undertake the rescue of a known diver in distress with serious

life-threatening injuries. The search and rescue permanently worsened Mr. Lewis' injuries.

If the Court of Appeals' decision is allowed to stand, the primary purpose of the Coast Guard and all those who rely on its expertise are in dire jeopardy. The Coast Guard's decision to rescue Mr. Lewis, fully aware of the severity and life-threatening nature of his diving injuries, required the exercise of due care. To find the government enjoys absolute sovereign immunity for all actions under the guise of the discretionary function exception would allow the Coast Guard to continue to hold itself out as a marine rescue expert, engender reliance from distressed mariners, and then fail to act with due care to the detriment of those in distress.[2]

The decision below conflicts with well-established principles of maritime jurisprudence and government tort liability. The legal principle stated by the Eleventh Circuit has no application to a Coast Guard search and rescue mission. If allowed to stand, distressed mariners who are negligently harmed will be stripped of their statutory remedies against the Coast Guard. Moreover and regardless of the gravity of the negligence, the ruling will virtually eliminate Coast Guard responsibility in all distress-at-sea cases.

Contrary to the statutory language of the Suits in Admiralty Act, Public Vessels Act, the Federal Tort Claims Act, and the Congressional purposes of those Acts, the Eleventh Circuit's decision represents a fundamental shift in Coast Guard responsibility and liability. In fact, the Eleventh Circuit's opinion

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2. The summary judgment record included testimony from all Coast Guard personnel that their primary and most important responsibility was to save the lives of those in distress at sea.

fails to recognize that the discretionary function exception only affords the Coast Guard sovereign immunity for the decision of *whether* to undertake a search and rescue. The Court of Appeals has established a bright-line rule of blanket immunity for all Coast Guard actions and never addresses the cornerstone principle that the Coast Guard is held to the same standard as a private party once it exercises its discretion to undertake a search and rescue.

As the grant of summary judgment threatens widespread misinterpretation and misapplication of controlling federal statutes, petitioners pray this Court to grant review of the Eleventh Circuit's decision. Mariners nationwide are entitled to the protections afforded by long-standing United States Supreme Court and other Circuit Court of Appeals precedent. They should not be deprived of their statutory rights against negligent government actors like the Coast Guard in this instance.

I. THE ELEVENTH CIRCUIT HAS FUNDAMENTALLY ELIMINATED GOVERNMENT TORT LIABILITY

In the present case, the Eleventh Circuit concluded:

> The discretion to undertake the rescue extends not only to the decision to rescue, but also to the methods chosen by the Coast Guard to effectuate the rescue.

Pet. App. 3a.[3]

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3. The Eleventh Circuit's holding cites only to the federal witness protection case of *Ochran v. United States*, 117 F.3d 495, 506 (11th Cir. 1997).

The Eleventh Circuit has adopted a rule of law which affords the United States Coast Guard, if not all governmental agencies, unbridled immunity from tort liability. Finding that the discretionary function exception precluded Coast Guard liability as a matter of law, the Eleventh Circuit has misinterpreted important Congressional mandates and aspects of governmental tort liability.

The decision is in direct conflict with this Honorable Court's decisions, as well as numerous decisions of the First, Fourth, Fifth, Sixth and Ninth Circuits. This case merits review to determine whether a governmental actor or agency can ever be subject to tort liability.

A. The Eleventh Circuit's Statutory Interpretation Violates Nearly Fifty Years of Government Maritime Jurisprudence

Since this Court's decision in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), the government has been held liable for negligent, detrimental conduct. The discretionary function exception, 28 U.S.C. § 2680(a), does not obviate a government agency's responsibility to act with reasonable care as the government is treated just as a private party. *See* 28 U.S.C. § 1346(b) and § 2674; *Indian Towing*, 350 U.S. at 68-9; *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957). The imposition of the maritime Good Samaritan standard – whereby a rescuer (whether a government actor or private volunteer) is only liable if the rescuer's conduct makes the victim worse off – serves as an additional safeguard against government tort liability. *See* Restatement (Second) of Torts 323 and § 324A. It is the appropriate measure of liability once a government

rescuer has exercised its discretion to act and then fails to act with due care. *Indian Towing* held:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chadeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care. . . . If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

Indian Towing, 350 U.S. at 69.

Contrary to this Court's treatment of *Indian Towing* as part of discretionary function exception law, the Eleventh Circuit never addressed *Indian Towing*'s teachings. Similarly, the Circuit Court never addressed the question of governmental liability for distress-at-sea cases. Despite the panel decision's finding that Mr. Lewis' "injuries were exacerbated by the delay in providing him emergency treatment following the accident" (Pet. App. 2a.), the Circuit Court disregarded its significance in the circumstances of this case. This means that even in cases where the Good Samaritan rule is satisfied, Coast Guard conduct is unreviewable. The panel decision not only eliminates review of Coast Guard search and rescue conduct but also abrogates the application of the Good Samaritan standard.

Did Congress really intend to prevent review of cases where a distressed mariner sought and relied upon the rescue expertise of the Coast Guard, which then subjected him to negligent conduct that "exacerbated" his injuries? The answer from this Court must be "No."

The discretionary function exception is properly used to prevent judicial second guessing where a government actor's conduct involves an element of judgment or choice *and* that conduct involves the permissible exercise of regulatory policy judgment. *See United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Berkovitz v. United States*, 486 U.S. at 536-37. *Berkovitz* and *Gaubert* affirm *Indian Towing*, and this Court has never strayed from the line of cases finding Coast Guard responsibility under these circumstances.

By granting unlimited discretion to the Coast Guard throughout search and rescue operations, the Eleventh Circuit ignores the synthesis of *Indian Towing* as explained in *Gaubert* and *Berkovitz*. and defies this Court's repeated adoption of *Indian Towing*'s Good Samaritan rule.

This case does not involve the decision as to whether the government should take over a bank (*Berkovitz*), approve and distribute a medical vaccine (*Gaubert*) or protect a witness (*Ochran*). The Coast Guard's initial decision of whether to respond to a distress-at-sea is rooted on considerations of regulatory public policy. However, once the response is undertaken, the Coast Guard does not act with any hope of reward in fulfilling its mission to save lives and is obligated to exercise reasonable care. *United States v. Gavagan*, 280 F.2d 319, 326-28 (5th Cir. 1960); *see Indian Towing*, 350 U.S. at 69; *Sagan v. United States*, 342 F.3d 493 (6th Cir. 2003); *Hurd v. United States*, 134 F.Supp. 2d 745 (D. S.C. 2001), *aff'd*, 34 Fed.Appx. 77, 2002 AMC 1584, 2002 WL 7300284 (4th Cir. 2002) (unpublished); *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988); *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189 (1st Cir. 1967); *United States v. Devane*, 306 F.2d 182 (5th Cir. 1962).

As in every other distress-at-sea case, this case does not involve any choices of a policymaking nature. This case is analogous to *Indian Towing*'s reasoning as interpreted by this Court, the Circuit Courts of Appeals and district courts reviewing Coast Guard actions while conducting a search and rescue.

This Court has repeatedly held the essence of maritime jurisprudence is governed by the principle of uniformity in the application of admiralty law. *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (J. Scalia); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401 (1970) (J. Harlan); *The Lottawanna*, 88 U.S. 558, 575 (1874). The Eleventh Circuit ruling violates this principle and invites haphazard and incongruous results. These results are unacceptable, particularly in the search and rescue context.

This case merits Supreme Court review to dispel the Eleventh Circuit's erroneous interpretation that the discretionary function exception shields all governmental agencies from liability. The decision ignores the true test for government responsibility and liability in a search and rescue context.

The First, Fourth, Fifth, Sixth and Ninth Circuit Courts of Appeals correctly discern the Coast Guard's duty to act with due care. These Circuits hold that the Coast Guard must exercise reasonable care once it undertakes a rescue, and failing to do so, subjects it, like any other governmental agency, to liability in accordance with the Good Samaritan rule. *See Sagan v. United States*, 342 F.3d 493 (6th Cir. 2003); *Hurd v. United States*, 134 F. Supp.2d 745 (D. S.C. 2001), *aff'd*, 34 Fed.Appx. 77, 2002 AMC 1584, 2002 WL 7300284 (4th Cir. 2002) (unpublished); *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988); *United States v. Gavagan*, 280 F.2d 319 (5th Cir. 1960); *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189 (1st Cir. 1967);

United States v. Devane, 306 F.2d 182 (5th Cir. 1962); *see also Daley v. United States*, 499 F. Supp. 1005, 1009-10 (D. Mass. 1980); *Lacey v. United States*, 98 F. Supp. 219 (D. Mass. 1951); *contra*, *Northern Voyager LP v. Thames Shipyard & Repair Co.*, 350 F.3d 247 (1st Cir. 2003).

Given the Eleventh Circuit's decision here, distressed mariners who rely on the expertise of the Coast Guard to their detriment are without recourse. *But see Indian Towing*, 350 U.S. at 68 ("The broad and just purpose which the [FTCA] was designed to effect was to compensate the victims of negligence in the conduct of governmental entities in circumstances like unto those in which a private person would be liable. . . ."). The decision for review creates confusion by holding all Coast Guard activities conducted under authority granted by 14 U.S.C. § 88 are unequivocally protected by the discretionary function exception.

This petition merits review to reaffirm and uphold the well-founded jurisprudence set forth in *Indian Towing* and its progeny cited above, finding that a government agency can be held liable for actions that occur after a course of action is chosen where those actions satisfy the Good Samaritan criteria. There is no discretion to act negligently during a search and rescue – neither for a private party nor the Coast Guard.

B. The Eleventh Circuit Has Violated the Separation of Powers Doctrine and the Supremacy Clause – The Exception Swallows the Rule

Congress has granted distressed mariners an express remedy against negligent government agencies. The Suits in Admiralty Act, 46 U.S.C. §§ 741-752, and the Public Vessels Act, 46 U.S.C. App. §§ 781-790, are remedial statutes which contain

broad waivers of sovereign immunity for acts of government negligence. This right of remedy applies, in particular, to distress-at-sea cases.

The general rule is that injured parties can maintain a cause of action for damages negligently caused by the Coast Guard. *See Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Sagan v. United States*, 342 F.3d 493 (6th Cir. 2003); *Hurd v. United States*, 134 F. Supp.2d 745 (D. S.C. 2001), *aff'd*, 34 Fed.Appx. 77, 2002 AMC 1584, 2002 WL 7300284 (4th Cir. 2002) (unpublished); *Rodrigue v. United States*, 968 F.2d 1430 (1st Cir. 1992); *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988); *United States v. Gavagan*, 280 F.2d 319 (5th Cir. 1960); *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189 (1st Cir. 1967); *United States v. Devane*, 306 F.2d 182 (5th Cir. 1962); *see also*, *Daley v. United States*, 499 F.Supp. 1005, 1009-10 (D. Mass. 1980); *Lacey v. United States*, 98 F. Supp. 219 (D. Mass. 1951)

While neither statute expressly provides an exception to the sovereign immunity waivers, such exception from the Federal Tort Claims Act, 28 U.S.C. § 2680(a), has been consistently implied into these acts. *See, e.g., United States Fire Ins. Co. v. United States*, 806 F.2d 1529, 1534-35 (11th Cir. 1986). The discretionary function exception creates, by its very nomenclature, a caveat to the general rule of these remedial statutes and operates as a limited revocation of the Acts' waivers of sovereign immunity. While courts have varied in applying the narrow exception to this rule, they have always stayed within the channel. However, the Eleventh Circuit has clearly steered out of the channel and run aground. Such a course is forbidden by Congress and this Honorable Court.

In applying the discretionary function exception to the Coast Guard's actions, the Eleventh Circuit adopted a rule that

contravenes the exception's plain statutory language as well as the Congressional purpose of the Federal Tort Claims Act. The discretionary function exception only applies to government actors "exercising due care." 28 U.S.C. § 2680(a). Thus, the Eleventh Circuit's decision, which neither addresses the degree of care exercised by the Coast Guard nor the propriety of applying the discretionary function exception once a Coast Guard search and rescue mission is undertaken, has misinterpreted and/or overlooked the applicable statutory language.

The Eleventh Circuit's opinion affirming the district court's grant of summary judgment creates a rule with the potential for unfettered application. This rule destabilizes this Court's stated purpose to the Federal Tort Claims Act and flies in the face of the broad and remedial purpose of these Acts which waive sovereign immunity.[4] *See Indian Towing*, 350 U.S. at 68-69; *O'Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir. 2002); *Kielwien v. United States*, 540 F.2d 676, 681 (4th Cir. 1976). The exception is not and never was intended to become the rule. The Circuit Court has adopted an exception in favor of the rule in a forbidden exercise of judicial legislation.

In distress-at-sea cases, courts have uniformly found the Coast Guard amenable to suit where the facts satisfied the maritime Good Samaritan rule – despite the government's attempts to raise the discretionary function exception. *See, e.g., Gavagan*, 280 F.2d at 328; *Huber*, 838 F.2d at 400-01; *Hurd*, 134 F. Supp.2d at 769. The discretionary function exception does not preclude the Coast Guard's duty to act with reasonable care after exercising its discretion and deciding to engage in a rescue of a distressed mariner.

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4. Now, the Eleventh Circuit destabilizes claims brought under the Suits in Admiralty Act and Public Vessels Act.

The Eleventh Circuit's decision shelters all governmental action under the immunity of the discretionary function exception. Further, the Eleventh Circuit's statutory interpretation conflicts with a large body of controlling and persuasive law which, if allowed to stand, threatens the Supremacy Clause[5] and the Separation of Powers Doctrine by permitting the judiciary to eliminate the plain language and Congressional intent of the remedial Acts at issue.

The Eleventh Circuit has decreed that government agencies are immune to the checks and balances of the judiciary. Its ruling catapults the discretionary function exception beyond its limitations. Under its reasoning, Congress' directives will be swallowed by the judiciary as negligent government actors may never be amenable to suit.

Decisions such as *Gavagan*, *DeVane*, *Hurd*, *Huber*, *Sandra & Dennis Fishing Co.*, hold that once the Coast Guard exercises its discretion to render aid to a distressed mariner, it is obligated to use due care. *See also*, *Indian Towing*, 350 U.S. at 69. At odds with these teachings, the Eleventh Circuit has joined the First Circuit in rewriting government tort liability legislation. *See Northern Voyager LP v. Thames Shipyard & Repair Co.*, 350 F.3d 247 (1st Cir. 2003). Coast Guard liability for negligent acts or omissions was, until very recently, the rule of law not only in the Eleventh Circuit but nationwide.[6] The destabilizing consequences of the Circuit Court's opinion and the conflicts created by its ruling will threaten all aspects of Congressional

5. U.S. Const., Article VI, Clause 2.

6. The Eleventh Circuit panel is bound by decisions of the prior Fifth Circuit (panel or en banc) absent a decision from the Eleventh Circuit sitting en banc. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

enactments waiving sovereign immunity for governmental tort liability.

In granting the Coast Guard unbridled discretion after it affirmatively chooses to assist a distressed mariner, the Eleventh Circuit stands alone with the recent decision from the First Circuit.[7] These decisions jeopardize the precepts of uniformity in maritime law. This dangerous trend of confusion and misinterpretation between the Circuits in failing to follow the appropriate law demonstrates the importance of this Honorable Court's review.

Absent review, this decision is tantamount to exonerating government liability in all search and rescue missions. This ruling countermands years of distress-at-sea cases and dictates that negligent government actors, like the Coast Guard, are free of liability – in spite of the Good Samaritan rule. Pet. App. 2a-4a. In effect, the Eleventh Circuit now holds that *all* Coast Guard actions are beyond the purview of the judiciary. No matter how repugnant the conduct, distressed mariners will be deprived of an express legislative remedy.

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7. Recently, the First Circuit has also adopted the idea of wholesale immunity for Coast Guard conduct. *Northern Voyager LP*, *supra*. The Eleventh Circuit and First Circuit stand at odds with well-settled jurisprudence, requiring the granting of this Petition to resolve the dangerous conflict among the Circuits.

II. THE ELEVENTH CIRCUIT'S OPINION GRANTING SOVEREIGN IMMUNITY TO COAST GUARD ACTIONS ONCE IT UNDERTAKES A RESCUE DIRECTLY CONFLICTS WITH ITS OWN CONTROLLING AUTHORITY AND NUMEROUS COAST GUARD DECISIONS FROM OTHER CIRCUITS

A. Eleventh Circuit Violates Its Own Controlling Authority

Neither the Eleventh Circuit's opinion affirming the district court's grant of summary judgment nor the district court's decision discuss two controlling decisions within the Eleventh Circuit. Both *United States v. Gavagan*, 280 F.2d 319 (5th Cir. 1960) and *United States v. DeVane*, 306 F.2d 182 (5th Cir. 1962) are Coast Guard search and rescue cases in which the discretionary function exception was rejected.[8] Relying on *Indian Towing*, the Fifth Circuit held the Coast Guard liable for negligently conducted search and rescue operations. *Gavagan*, 280 F.2d at 328-329. This finding hinged on the evidence demonstrating the Coast Guard failed to exercise reasonable care in conducting the rescue and "worsened" the victim's position after the decision to undertake the rescue was made. *Devane* reiterated the Fifth Circuit's interpretation of *Indian Towing* and the Federal Tort Claims Act.

In the instant case, the district court never addressed these two controlling and analogous decisions. The district court's analysis of the discretionary function exception and presumably

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8. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (the newly created Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981); *see* footnote 5, *supra*.

14 U.S.C. § 88, examined only one Coast Guard search and rescue case. Citing the decision of *Northern Voyager LP v. Thames Shipyard & Repair Co.*, 214 F. Supp.2d 47 (D. Mass. 2002)[9], the district court found *all* Coast Guard actions as to how to conduct the search and rescue of Mr. Lewis (even after it had made the decision to undertake the rescue) were discretionary in nature and, thus, "protected by the discretionary function exception." Pet. App. 13a-14a.

The rule that the Coast Guard must act with reasonable care once it makes the affirmative discretionary decision to undertake a search and rescue has been a cornerstone of the Fifth and Eleventh Circuit's jurisprudence for over forty years.

However, neither the district court nor the Eleventh Circuit considered *Gavagan* or *DeVane*. Instead, the Eleventh Circuit relied exclusively upon its own interpretation of the discretionary function exception in a Federal Tort Claims Act witness protection case. Pet. App. 3a. While the holding in *Ochran v. United States*, 117 F.3d 495 (11th Cir. 1997) is questionable on its face, it has no application to the present case involving a Coast Guard search and rescue, particularly where *Gavagan* and *DeVane* demand a different result.

As the Eleventh Circuit's panel decision contravenes this Honorable Court, other Circuit Courts of Appeals as well as its own controlling authority, the petition clearly merits review. The discretionary function exception was never intended to

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9. *Aff'd in part, vacated in part, remanded by*, 350 F.3d 247 (1st Cir. 2003). As this decision is also at odds with controlling jurisprudence, Northern Voyager LP has recently filed a Petition for Writ of Certiorari with this Court. Petitioners would state that the confusion between the Circuits further demonstrates the need for Supreme Court review of this important question with far-reaching ramifications.

provide complete immunity to all Coast Guard actions carried out pursuant to 14 U.S.C. § 88. However, the Circuit Court panel has created a new rule of law, impliedly overruling its own controlling precedent and *Indian Towing*, in which all governmental actions have become discretionary in nature so that the discretionary function exception arguably eliminates government tort liability. Undoubtedly, the decision eliminates Coast Guard responsibility in the Eleventh Circuit.

B. A Split Exists Between the Circuit Courts of Appeals Concerning the Interpretation and Application of the Discretionary Function Exception in Coast Guard Search and Rescue Decisions

By granting the Coast Guard wholesale discretion and immunity from liability, the Eleventh Circuit is now at odds with the First, Fourth, Fifth, Sixth and Ninth Circuit Courts of Appeals.

Sandra & Dennis Fishing Corp., *Hurd*, *Gavagan*, *Devane*, *Sagan*, and *Huber* each hold that while the Coast Guard enjoys absolute discretion to decide to undertake a search and rescue, once it exercises that discretion and makes the decision to institute a distress-at-sea rescue operation, it must act with reasonable care. *See Sandra & Dennis Fishing Corp.*, 372 F.2d at 195-97; *Hurd*, 34 Fed.Appx. at 83 (unpublished), *affirming* 134 F. Supp.2d at 768-69; *Gavagan*, 280 F.2d at 328; *DeVane*, 306 F.2d at 186; *Sagan*, 342 F.3d at 498; *Huber*, 838 F.2d at 400-01.

In contrast, the Eleventh Circuit decision in this case means that the Coast Guard is not held to any standard of care once it exercises its discretion to undertake a search and rescue: "The discretion to undertake the rescue extends not only to the

decision to rescue, but also to the methods chosen by the Coast Guard to effectuate the rescue." Pet. App. 3a. The Court also found the discretionary function exception applied because the applicable Coast Guard manuals contained discretionary, not mandatory, language. Pet. App. 3a.

This rule of law directly conflicts with the Circuit Courts above. Through the judicial expansion of the discretionary function exception to include all aspects of a Coast Guard search and rescue, the Eleventh Circuit has split with the vast majority of Circuit Courts of Appeals that have decided this question. The allowance of a writ of certiorari will allow this Honorable Court to resolve the conflict among the Circuits.

III. THIS COURT SHOULD REFUSE TO ADOPT THE ELEVENTH CIRCUIT'S SEARCH AND RESCUE MOTTO – *SEMPER PARATUS, INTERDUM PRUDENS* [10]

Coast Guard personnel have testified in accordance with Coast Guard manuals that saving lives is the Coast Guard's most important mission. However, the Eleventh Circuit's rule undermines this paramount mission. By interpreting 14 U.S.C. § 88 as affording the Coast Guard absolute discretion and immunity for all acts and omissions during a distress-at-sea operation, the Eleventh Circuit has adopted a maxim denounced by the First Circuit over three decades ago. *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d at 197; *but see* footnotes, 6 & 8, *supra*.

"Always Ready, Sometimes Careful" creates a dangerous precedent for distressed mariners and conflicts with the desired Congressional result in enacting 14 U.S.C. § 88, the Suits in

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10. "Always Ready, Sometimes Careful"

Admiralty Act, the Public Vessels Act and the Federal Tort Claims Act. Exonerating Coast Guard responsibility for negligent conduct which enhanced a distressed diver's injuries is contrary to the whole jurisprudence of distress-at-sea cases.

This motto is particularly offensive in the instant case because of the Coast Guard's prior knowledge and mandates directing the subject Coast Guard station to properly conduct a search and rescue of an injured diver, the Coast Guard's failure to utilize all available resources, the Lewis vessel's detrimental reliance on Coast Guard rescue expertise, and the resulting enhancement of Mr. Lewis' injuries. *See* Pet. App. 2a.

The Eleventh Circuit has now drifted afoul in deciding Coast Guard responsibility in distress-at-sea cases. Congressional mandates and a whole body of maritime jurisprudence will be turned on their heads unless this petition is granted. The discretionary function exception has now overtaken the express waiver of sovereign immunity as well as general principles of admiralty law. As demonstrated by the recent pronouncements of the First and Eleventh Circuits, the split among the Circuit Courts creates a conflict of significant importance.

The petition should be granted to resolve the conflicts among the Circuits and with this Court's decisions. As noted by this Court, the Circuit Courts have had difficulty interpreting the appropriate scope of the discretionary function exception. *Gaubert*, 499 U.S. at 335-37. (J. Scalia, concurring in part). This confusion has resulted in the misplaced expansion of this narrow exception and changed the entire arena of government tort liability.

CONCLUSION

For the reasons set forth above, the petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED NOVEMBER 20, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-16450

D.C. Docket No. 01-00821-CV-3-J-25TEM

JOE LEWIS, as parent and guardian of Brandon D. Lewis, JUDY LEWIS, as parent and guardian of Brandon D. Lewis, BRANDON D. LEWIS, an individual Florida resident,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, U.S. COAST GUARD,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

(November 20, 2003)

Before BLACK, HULL and COX, Circuit Judges.

PER CURIAM:

Joe Lewis, Judy Lewis, and Brandon Lewis ("Appellants") appeal the district court's grant of summary

judgment to the United States and United States Coast Guard. Brandon Lewis developed the "bends" while scuba diving off the coast of Jacksonville, Florida. Tragically, it seems clear that his injuries were exacerbated by the delay in providing him emergency treatment following the accident. The Appellants filed this tort action against the United States, alleging that the negligence of the Coast Guard in the conduct of the rescue caused the delay in treatment. The district court determined that the discretionary function exception applied, and thus, that the United States had not waived its immunity from suit.

The Appellants raise three issues on appeal, contending that: (1) the district court erroneously determined that the United States had not waived its sovereign immunity because the "discretionary function exception" applied; (2) genuine, disputed issues of material fact existed, making summary judgment inappropriate; and (3) the district court failed to properly address the Appellants' motion for summary judgment.

We review de novo the district court's conclusion that it was without subject matter jurisdiction. *Mid-South Holding Co. v. United States,* 225 F.3d 1201, 1204 (11th Cir. 2000). We review de novo the district court's order granting summary judgment. *Burton v. City of Belle Glade,* 178 F.3d 1175, 1186-87 (11th Cir. 1999).

The discretionary function exception, codified in the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq,* preserves the United States's sovereign immunity against "[a]ny claim . . . based upon the exercise or performance or the failure to

exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). In *United States v. Gaubert,* 499 U.S. 315, 111 S. Ct. 1267 (1991), the Supreme Court articulated a two-part test to guide courts on the application of the discretionary function exception. The exception applies only (1) when the relevant conduct involves an element of judgment or choice on the part of the government actor, and (2) when the conduct involves considerations of public policy. *Id.* at 322-23, 111 S. Ct. 1273-74.

The Appellants contend that the only discretion that the Coast Guard could exercise was in the affirmative decision to rescue Brandon Lewis, and that once the rescue began, the Coast Guard was bound to act with reasonable care. The Appellants argue that, during the rescue, the Coast Guard did not follow mandatory and non-discretionary language contained in the Search and Rescue (SAR) Manual and the Coast Guard Addendum to the SAR Manual.

We disagree. The discretion to undertake the rescue extends not only to the decision to rescue, but also to the methods chosen by the Coast Guard to effectuate the rescue. *See Ochran v. United* States, 117 F.3d 495, 506 (11th Cir. 1997) (holding that any alleged negligence in protecting a witness was not actionable because deciding how to protect a witness involves the "exercise of policy judgment" within the purview of the discretionary function exception.) Furthermore, the language cited by the Appellants in the applicable manuals is discretionary and not mandatory.

Appendix A

As to the Appellants' argument that disputed questions of material fact precluded the grant of summary judgment, we conclude that the district court's determination that the discretionary function exception applied did not require the resolution of any disputed issues of material fact. Thus, the district court properly concluded that it lacked subject matter jurisdiction. This determination precluded consideration of the merits of the Appellants' motion for summary judgment.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION FILED NOVEMBER 5, 2002

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION
IN ADMIRALTY

CASE. NO. 3:01-cv-821-J-25TEM

JOE LEWIS and JUDY LEWIS, as parents and guardians of BRANDON D. LEWIS, and BRANDON D. LEWIS, an individual Florida resident,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, and THE UNITED STATES COAST GUARD,

Defendants.

ORDER

THIS CAUSE is before the Court on the Government's Motion to Dismiss (Dkt. 32), which was converted to a summary judgment motion (hereinafter, "Converted Motion for Summary Judgment"), Plaintiffs' Motion for Summary Judgment, the parties' responses thereto, and the Government's reply memoranda. Upon consideration of same and being otherwise advised of the record herein, the Court finds as follows:

Appendix B

On February 13, 2000, while Brandon Lewis was scuba diving off the coast of Jacksonville, Florida, he had a diving accident. The United States Coast Guard ("the Coast Guard") rescued and transported Brandon Lewis to a medical facility aboard CG 41428. Plaintiffs sue the United States, under the Suits in Admiralty Act ("SAA"), 46 U.S.C. App. § 741 *et seq.*, for the Coast Guard's purported negligence in its rescue of Brandon Lewis. The Government in its Converted Motion for Summary Judgment seeks dismissal of this lawsuit, claiming that it is immune from suit under the discretionary function exception.

The discretionary function exception applies to claims arising under the SAA.[1] Pursuant to the discretionary function exception, the Government is not liable for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the

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1. "[T]he SAA implicitly contains a "discretionary function exception" to the United States' waiver of sovereign immunity, on the ground that the principle of separation of powers requires that the judiciary refrain from interfering in those executive branch actions that involve questions of public policy, economic expediency and administrative practicability." *United States Fire Ins. Co. v. United States,* 806 F.2d 1529, 1535 (11th Cir. 1986)(citing, in part, Williams *v. United States;* 747 F.2d *700* (11th Cir.1984) (per curiam), affg *and adopting Williams ex rel. Sharpley v United States,* 581 F. Supp. 847, 852 (S.D. Ga.1983)); *see also Mid-South Holding Co., Inc. v. U.S.*, 225 F.3d 1201, 1204 (11th Cir. 2000) (noting that the Eleventh Circuit follows the majority holding that the SAA's waiver of immunity is subject to the discretionary function exception) (citing *Williams v. United States,* 747 F.2d 700, 700 (11th Cir.1984), *aff'g and adopting Williams By and Through Sharpley v. United States,* 581 F. Supp. 847 (S.D. Ga.1983)).

part of a federal agency or an employee of the Government; whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

The Supreme Court articulated a two-part test for determining whether the discretionary function exception bars the Government's liability in a particular case. Both parts of this test must be satisfied for the discretionary function exception to apply. *Berkovitz v. United States,* 486 U.S. 531, 536 (1988) (noting that the inquiry does not end with a determination that the challenged conduct involves an element of judgment; the court must also determine whether the judgment is the kind that the discretionary function exception was designed to shield).

First, the court must determine whether the nature and quality of conduct at issue involves an element of judgment or choice. *See Berkovitz,* 486 U.S. at 536 (citing *Dalehite v. United States,* 346 U.S. 15, 34 (1953)). If the conduct involves an element of judgment or choice, the court must then determine whether that judgment or choice was grounded in policy considerations. This is because the discretionary function exception is intended "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through- the medium of an action in tort" *United States v. Varig Airlines,* 467 U.S. 797, 814 (1984). Having said this, the Court recognizes that it is not necessary to find that the government actor actually weighed policy considerations before he or she acted. Instead, the focus is on whether the actions are "susceptible to policy analysis," *United States v. Gaubert,* 499 U.S. 315, 325 (1991).

Before applying this test, the Court must determine what conduct is protected by the discretionary function exception. The Government claims that the discretionary function exception applies to the Coast Guard's decision to rescue Brandon Lewis and its determination of how to conduct that rescue. In contrast, Plaintiffs' position is that, if the exception applies, it applies only to the Coast Guard's decision to rescue Brandon Lewis, not its determination of how it will conduct the rescue.

Plaintiffs' view is based on their belief that once the Coast Guard made the decision to rescue Brandon Lewis, it had no discretion to ignore the procedures set forth in the United States National Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue Manual ("SAR Manual"), the Coast Guard Addendum to the SAR Manual ("Coast Guard Addendum"), and the Miami Search and Rescue Plan ("Miami SAR Plan").[2] (These manuals will be referred to collectively as "the Manuals") Plaintiffs claim that these documents dictate how the Coast Guard was to conduct a rescuer, like the one at issue: If Plaintiffs' contention is correct, then the discretionary function exception will not shield the Government from liability in this case because, if a federal statute, policy, or regulation specifically mandated the procedure for the Coast Guard to follow, the Coast Guard had no discretion to ignore these directives and use its own judgment. *See Gaubert,* 499 U.S. at 324.

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2. The Miami SAR Plan is for use in SAR operations by all federal agencies in the Seventh Coast Guard District, including Mayport. *See* Miami SAR Plan, Letter of Promulgation (Pls.'s Mt. for Summary Judgment (Dkt. 29), Ex. 33).

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Specifically, Plaintiffs argue that the following provisions from the Manuals dictate how the Coast Guard should have conducted the rescue of Brandon Lewis: When evaluating a rescue response, the person handling the SAR operation "should consider injuries or other medical conditions that might require special response rescue response." *See* SAR Manual, 6.3.1 (emphasis added). The SAR Manual states that this person should also consider:

> condition of survivors; (If not known, assume urgent medical attention will be required: If known, obtain a detailed description of injuries. This will determine the need for stretchers, oxygen, blood plasma, intravenous fluids, or other medical supplies.)

SAR Manual, 6.3.1. Although SAR personnel are not required to be experts in providing medical diagnosis or treatment of diving injuries, "SAR personnel in places with known diving activity should be able to recognize the general symptoms of dive-related injuries so that their potential severity is recognized and medical advice obtained, and basic steps are taken to minimize worsening occurrences. . . ." SAR Manual, 6.15.2 (emphasis added). The section in the Coast Guard Addendum regarding the emergency treatment for decompression sickness and air embolism provides that "[w]here the capability exists, the following steps are *advised*: . . . [a]dminister 100% oxygen." Coast Guard Addendum, 6.F.2(5) (emphasis added).

The use of the words "should" and "advised" seriously undermines Plaintiffs' contention that these provisions are

mandatory, rather than precatory. *See, e.g., Jolly v. Listerman*, 672 F.2d 935, 945 (D.C. Cir. 1982) ("The use of the word "should" detracts significantly from any claim that this guideline is more than merely precatory. The fact that it is described as a "guideline" should also hint of precatory intent."), *Hamlet v. United States*, 63 F.3d 1097, 1104 (Fed. Cir. 1995) (citing cases wherein the court found that the use of the "should," is precatory, not mandatory.). The preface to the BAR Manual illustrates this understanding:

> SAR planning is both an art and a science; relying greatly on the creativity and experience of the personnel involved. Because of the many variables encountered during SAR operations and the individuality of each SAR case, the *guidance provided in this* (manual] *must be tempered with sound judgement, having due regard for the* individual situation. Nothing in this Manual should be construed as relieving SAR personnel of the need for initiative and sound judgement. Therefore, few actions or procedures discussed in this Manual are mandatory. Use of the words "must" or "shall" only distinguish those actions or procedures normally considered mandatory from those that are discretionary.

SAR Manual, Vol. I, Preface 3(a) (emphasis added). The Discussion section of the Commandant Instruction M16130.2B of the Coast Guard Addendum states in even clearer language that "Coast Guard personnel are *expected to exercise broad discretion* in performing the functions discussed" therein. *See Coast* Guard Addendum,

COMDTINST M 16130.2B, at 2 (emphasis added). It continues, "[t]he Coast Guard *retains the discretion to deviate from or change* this guidance without notice. This document creates no duties, standard of care, or obligations to the public and should not be relied upon as a representation by the Coast Guard as to the manner of proper performance in any particular case." *Id.* (emphasis added). Miami SAR Plan uses the word "guidance" in explaining the purpose of the plan. The Miami SAR Plan sets forth procedures and internal *guidance* intended to maximize performance of Seventh District units involved in search and rescue missions. It does not define minimum performance standards, create Coast Guard obligations, nor create rights in third parties." *See* Miami SAR Plan, Letter of Promulgation (emphasis added). Thus, by their plain language, the Manuals cannot be interpreted as policy dictating a course of action.

Despite the above language from the Manuals, Plaintiffs are intent on reading mandatory language into these documents. In support of their position, Plaintiffs offer the deposition testimony of their expert, David E. Cole ("Cole"), a retired Coast Guard Commander. Plaintiffs contend that Cole's testimony creates a genuine dispute of material fact, precluding summary judgment on this issue. The Court disagrees. Although the existence of a genuine issue of material fact regarding the mandatory nature of a procedural policy precludes summary judgment, *see Commerce and Industry Ins. Co. v. Grinnell Corp.*, 280 F.3d 566, 573-75 (5th Cir. 2002), Cole's testimony does not create a material dispute of fact.

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In *Grinnell*, several insurance companies brought a subrogation action against the City of New Orleans for fire-loss claims. The suit was based upon the alleged negligent acts of members of the city's fire department. Although this was not a case arising under federal law, there was a state statute limiting liability for discretionary acts. In determining whether an act is discretionary, the Fifth Circuit, following the lead of the Louisiana courts, utilized the federal discretionary function exception analysis elaborated in *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

To prove that the actions taken by the city were not discretionary, the insurance companies in *Grinnell* offered testimony from the city's Chief of the Fire Department and its Chief Electrical Inspector. These individuals testified regarding internal policies mandating a specific course of action to be taken under circumstances that were present in that case.

Cole, unlike the witnesses in *Grinnell*, does not testify about an internal policy mandating the course of action for rescues by the Mayport Coast Guard. Instead, he insists that the Manuals mandate a course of action. His insistence, however, is based solely on what he thinks should have happened during this rescue, not what was "required" to, happen. This becomes clear early on in Cole's deposition, where Cole states:

> There are a great many variables to say you must do this and you must do that. The Coast Guard, God knows, has enough manuals for everything.

Appendix B

> What the Coast Guard must do is, when it does something, do it right. Than manuals provide *guidance* to that. The manuals try to foresee every circumstance that can come up, but I can tell you they don't. You've got to do the best you can. The manuals stress the seriousness of decompression sickness. The manuals don't say you must carry . . . whatever on every boat that gets underway. . . . *The Coast-Guard recognizes in its manuals that it's leaving a great deal up to its field personnel* . . . When you say what does the manual require, it requires the Coast Guard to save lives and to use everything available to do it. That's what the Coast Guard manuals require. . . . Doing what is proper and what is right is required. Now, where does it state everything that is proper and everything that is not proper specifically? I don't know of any Coast Guard publication that says that.

Depo. of Cole, pp. 57-58 (emphasis added). Although he adamantly believes the Coast Guard should have conducted the rescue differently than it did, Cole's belief is not based on mandatory language from the Manuals.

Accordingly; the Court finds that here is no statute, regulation, or policy in the record that supports Plaintiffs' position that a specific course of conduct was mandated in the rescue of Brandon Lewis. Instead, the Manuals confer upon the Coast Guard broad discretion to exercise its own judgment regarding a rescue like the one in this case. Thus, the exercise of judgment by the Coast Guard in this case-be

it deciding to rescue Brandon Lewis, deciding how to proceed with the rescue of Brandon Lewis, including the staffing and supplying of a rescue boat and training of its personnel, or deciding what resources to use in executing the rescue is clearly discretionary and of the nature and quality protected by the discretionary function exception. *See Northern Voyager LP v. Thanes Shipyard & Repair Co.*, 214 F. Supp. 2d 47, 51 (D. Mass. 2002) (noting that "[n]ot only does the very premise of emergency rescue logically suggest that decisions be made quickly and responsively, without the constraints of inflexible procedures, Coast Guard regulations and procedural handbooks specifically mandate as much").

The Court also finds that the second prong of the discretionary function exception is satisfied. "When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Gaubert*, 499 U.S. at 324. As noted above, the Manuals explicitly grant the Coast Guard the discretion to decide how to rescue an individual. Thus, it is presumed that its decisions in this regard involve policy considerations protected under the exception.

Additionally, the Eleventh Circuit's analysis of the discretionary function exception in *Ochran v. United States*, 117 F.3d 495 (11th Cir. 1997), persuades this Court that the decisions and ensuing actions taken by the Coast Guard in this case are borne out of policy considerations and protected by the discretionary function exception. In *Ochran*, the United States was sued for the actions of an Assistant United

States Attorney ("AUSA"), who assumed the responsibility of protecting a witness threatened by a criminal drug defendant. The Eleventh Circuit found that any alleged negligence in discharging this duty was not actionable because deciding how to protect a witness involves the "exercise of policy judgment" within the purview of the discretionary function exception. *Id.* at 506. In a footnote, the Eleventh Circuit did add a caveat to its finding when it emphasized that if the AUSA had promised to perform specific actions, such as stationing United States Marshals at the witness' door, and then negligently misplaced the paperwork necessary to make these arrangements, a different result may have been reached. *Id.* at 506 n.7.

Like the AUSA's decision in *Ochran*, the Coast Guard's decision to rescue Brandon Lewis and its decision how to proceed with the rescue of Brandon Lewis are protected by the discretionary function exception, as these decisions are unquestionably "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. Furthermore, the Coast Guard never made any specific promises about haw it would conduct the rescue. Thus, the Eleventh Circuit's caveat in *Ochran* would not afford Plaintiffs the ability to overcome the discretionary function exception.

There is yet another factor that convinces the Court that rescue decisions of Coast Guard Mayport are steeped in policy considerations. "Search and rescue" is only one of the Coast Guard's missions, *see, e.g.*, 14 U.S.C. § 2. Thus, the allocation of money and time for the execution of its missions or duties invokes policy considerations. *See, e.g., United States v. Varig Airlines*, 467 U.S. 797, 820 (1984)

(explaining that decisions requiring an agency "to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding" are protected by the discretionary function exception); *Ochran*, 117 F.3d at 502 (recognizing that "budgetary constraints are almost always important to government decisions" and that the allocation of limited government resources implicates policy considerations protected by the discretionary function exception). This allocation of funds and time necessarily includes Coast Guard Mayport's decisions about staffing and training its personnel and its decisions regarding whether or not to commit outside resources to a rescue. These decisions are quintessential examples of the kind of judicial "second-guessing" and intervention in policymaking decisions that the discretionary function exception was designed to prevent. *Varig Airlines*, 467 U.S. at 820.

Based on the above, the Court finds that the discretionary function exception shields the Government from liability for the decisions at issue here. Having found that the discretionary function exception applies in this case, the Court cannot reach the merits of Plaintiffs' Motion for Summary Judgment, as the Court is without subject matter jurisdiction to do so. *See Mid-South Holding Company, Inc. v. United States*, 225 F.3d 1201, 1207 (11th Cir.2000); *see also Cohen v. United States*, 151 F.3d 1338, 1340 (11th Cir.1998) (characterizing sovereign immunity as an issue of subject matter jurisdiction).

Accordingly, it is **ORDERED:**

1. The Government's Motion to Dismiss (Dkt. 32) is **GRANTED**.

2. All pending motions are **DENIED AS MOOT.**

3. The Clerk is directed: to enter final judgment in favor of the Government and against Plaintiffs and close this case.

DONE AND ORDERED in Chambers this 6 day of November, 2002.

s/ Henry Lee Adams, Jr.
HENRY LEE ADAMS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 12, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-16450-CC

JOE LEWIS, as parent and guardian of Brandon D. Lewis, JUDY LEWIS, as parent and guardian of Brandon D. Lewis, BRANDON D. LEWIS, an individual Florida resident,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, U.S COAST GUARD,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: BLACK, HULL and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules

of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE